

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

**Matter Number:** 845/20  
**Applicant:** Lillian Galea  
**Respondent:** Woolworths Limited  
**Date of Determination:** 28 April 2020  
**Citation:** [2020] NSWCC 132

The Commission determines:

1. That the surgical treatment for the admitted subject injury was a material contribution to Mrs Galea's consequential condition of Lichen Planus.
2. That Ms Galea has thereby suffered consequent post-inflammatory hyperpigmentation on her back, buttocks, legs and arms.

The Commission orders:

1. I remit this matter to the Registrar for referral to an Approved Medical Specialist for a whole person assessment on the following bases:
  - (a) Date of injury: 27 June 2017
  - (b) Matters for assessment: Left upper extremity, Scarring
  - (c) Evidence:
    - (i) ARD and attached documents,
    - (ii) Reply and attached documents.

A brief statement is attached setting out the Commission's reasons for the determination.

John Wynyard  
**Arbitrator**

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOHN WYNYARD, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*S Naiker*

Sarojini Naiker  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## **STATEMENT OF REASONS**

### **BACKGROUND**

1. Lillian Galea, the applicant, brings an action against Woolworths Limited, the respondent for payment of lump sum compensation in respect of an injury she received and a consequential skin condition that developed thereafter.
2. The s 74 notice issued on 12 December 2018 and the Application to Resolve a Dispute (ARD) and Reply were duly lodged.

### **ISSUES FOR DETERMINATION**

3. The parties agree that the following issue remains in dispute:
  - (a) Did Ms Galea suffer a consequential condition by way of bodily disfigurement/scarring as a result of the injury?

### **PROCEDURE BEFORE THE COMMISSION**

4. This matter was heard by teleconference on 24 March 2020. Mr Phillip Perry of counsel appeared for the applicant, instructed by Ms Alana Guittari. Mr Andrew Parker of counsel instructed by Mr Sean Patterson for the respondent. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

### **EVIDENCE**

#### **Documentary Evidence**

5. The following documents were in evidence before the Commission and taken into account in making this determination:
  - (a) ARD and attached documents;
  - (b) Reply and attached documents.

#### **Oral Evidence**

6. No application was made in relation to oral evidence.

### **FINDINGS AND REASONS**

#### **Agreed facts**

7. At conciliation the parties agreed the following facts:
  - (a) Ms Galea commenced employment as a casual with the respondent in 2003. She became a permanent employee in 2010.

- (b) On 27 June 2017, in the course of her employment she suffered a fractured scaphoid on the left hand, for which liability was accepted.
- (c) Ms Galea came to surgery by way of open reduction and internal fixation on 26 July 2017 at the Macquarie University Hospital with Dr Michael Dowd, Plastic Surgeon.
- (d) One week following the surgery Ms Galea developed a rash that was diagnosed as being Lichen Planus. Ms Galea underwent successful treatment which eliminated the active Lichen Planus. However she was left with post-inflammatory hyperpigmentation on her back, buttocks, legs and arms.
- (e) Until 21 July 2017 Ms Galea had been under the care of the respondent's local medical practitioner, Dr Hamsi. She changed practitioners on 21 July 2017 and was thereafter treated by Dr Eric Lim, General Practitioner. Dr Lim then referred Ms Galea to Dr Ebrahim Abdullah, who works at The Skin Hospital, who reported on 13 October 2017. Ms Galea's solicitors retained Dr Min Fee Lai, an expert in General Surgery, Plastic And Reconstructive Surgery, who reported on 7 August 2018 as Ms Galea's medico-legal referee. Ms Galea was assessed by Dr Paul Curtain, Hand and Plastic Surgeon for the respondent on 30 November 2018.

## Medical opinion

### Dr Lim

8. Thus, Dr Lim was the treating GP for five days before, and following the surgery on 26 July 2017. In his report to Ms Galea's solicitors of 20 November 2018, Dr Lim said:<sup>1</sup>

*"Specific Questions*

She developed a skin rash following surgery, on a background of no prior reported skin conditions. Lichen planus may be triggered by drugs, which in this case was likely related to the anesthetic or post-operative pain medications such as NSAIDs. She has suffered skin discolouration, scarring, and will require ongoing medication management."

### Dr Abdullah

9. Dr Abdullah reported back to Dr Lim on 13 October 2017, reporting that the diagnosis was indeed Lichen Planus and that ointment had been prescribed to manage it<sup>2</sup>. On 10 November 2017 Dr Abdullah reported to Dr Lim that the condition had been successfully treated<sup>3</sup>. He noted that she had post inflammatory hyper pigmentation, and in both reports he noted that the condition came on a week after surgery for the fractured scaphoid in the left hand.
10. Dr Abdullah did not display on his letterhead the nature of his qualifications, but it is clear from his reports and from his employment at The Skin Hospital that he is an expert on skin conditions.
11. The insurer was of that view, and wrote to Dr Abdullah, who replied on 21 November 2017,<sup>4</sup> saying:

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<sup>1</sup> ARD page 36

<sup>2</sup> ARD page 50

<sup>3</sup> ARD page 51

<sup>4</sup> ARD page 178

“...Based on our clinical examination the clinical diagnosis for Lillian Colena Galea is lichen planus. This is an idiopathic autoimmune condition. The lesions apparently started one week after she has had hand surgery for the scaphoid bone on left hand. Itchy papules and plaques had initially started on the hands and then had generalised. Newer lesions were appearing at the time of consultation. Lichen planus is an idiopathic condition and it is probably unrelated to the surgery that Miss Galea underwent to her left hand. The skin condition is unrelated to her current employment as a store person at Woolworths. My understanding is that the skin condition was not a pre-existing condition and has occurred only one week after her surgery. Her lichen planus is currently not aggravated by any pre-existing or degenerative condition.”

#### **Dr Lai**

12. As indicated, Dr Min Fee Lai reported to Ms Galea’s solicitors on 7 August 2018.<sup>5</sup> He noted that Ms Galea had three sons, of whom one was dependant. He was seven years old and lived with his mother. He was also on the autism spectrum. Dr Lai recorded that Ms Galea had been back at work since June 2018. He took a consistent history of the injury and subsequent surgery with Dr Dowd. With regard to the restrictions Ms Galea noticed, Dr Lai said:<sup>6</sup>

“...she had significant trouble looking after herself and her disabled son. She could not cook proper meals to feed her son and herself and felt that she was malnourished in between the injury and the date of the operation, which was about a month. During this time, she felt very stressed mentally, worrying about the care for her son.”

13. Dr Lai gave a consistent history of the onset of the lichen planus a week after Ms Galea’s surgery. He said that after a minimal response to Dr Lim’s treatment, Dr Lim referred Ms Galea to Dr Abdullah, whose management cleared the active lichen planus, but which left her with post inflammatory hyperpigmentation over her back, buttocks, legs and arms. Dr Lai noted:

“...she is particularly conscious of the dark patches over her upper and lower limbs, buttocks and back. She is unable to wear any low cut dresses and tends to wear pants and long sleeves to hide these dark patches. She does not show these dark areas to her male partners and has also complained of her intimacy being affected.”

14. With regard to the causation of the lichen planus, Dr Lai said:<sup>7</sup>

“...it is my opinion that her malnourishment and stress between the date of the injury and the date of the operation on balance of probability caused the Lichen Planus condition to erupt over her trunk and limbs. This eruption happened one week after the surgery.”

#### **Dr Curtain**

15. Dr Curtain took a consistent history of the injury and subsequent surgery. When asked whether the development of the lichen planus was related to Ms Galea’s employment injury, Dr Curtain said:<sup>8</sup>

“My understanding of this condition is that the causes leading to its appearance are incompletely understood. The condition apparently has some features consistent with an autoimmune disease and several precipitating factors have been proposed, but are not proven. These factors include hepatitis C infection, exposure to the flu

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<sup>5</sup> ARD page 10

<sup>6</sup> ARD page 12

<sup>7</sup> ARD page 15

<sup>8</sup> Reply page 6

vaccine, certain nonsteroidal anti-inflammatory drugs and medications for heart disease and blood pressure. Surgical trauma or stress has not been advanced as a possible cause. I concur with the expert opinion of Dr Ebrahim Abdulla Consultant Dermatologist, who has stated that lichen planus is an idiopathic condition and is probably unrelated to the surgery that Ms Galea underwent to her left hand.”

### **Applicant’s statement**

16. In her statement of 29 November 2019, Ms Galea said:<sup>9</sup>

“11. Following my left hand injury, I had a lot of difficulty performing the tasks I once used to. I am a full-time carer for my disabled son and caring for him became especially difficult. I could not cook proper meals to feed my son and myself and feel that he was malnourished from the time of my injury up until the surgery. This was a very stressful time for me.”

17. Ms Galea gave a consistent account of her surgery and the onset of the lichen planus a week later. She said that the pigmentation was very noticeable. She said:<sup>10</sup>

“14. I can confirm I never had any problems with my skin or rashes before my work injury and am confident the surgery is responsible for the development of my lichen planus rash.”

18. Ms Galea confirmed that she was self-conscious because of the pigmentation.

### **Section 78 Notice**

19. The s 78 Notice of 12 December 2012 discussed the various reports I have considered. It said:<sup>11</sup>

“While it is not disputed that you contracted the condition approximately one week after surgery, there is no evidence that you were malnourished and/or stressed between the date of injury and date of operation. Further, there is no conclusive medical evidence which links malnourishment and/or stress to Lichen Planus. As Dr Abdulla stated, it is an idiopathic condition.”

### **SUBMISSIONS**

#### **Mr Parker**

20. Mr Parker submitted that Ms Galea’s belief that the onset of her Lichen Planus condition had been caused by the surgery, was not relevant. I with respect, disagree. Whilst certainly not conclusive, it is one of the strands of evidence that is available to make up part of the chain of causation.

21. Mr Parker relied on the opinions of Dr Curtain and Dr Abdulla, that the cause of Lichen Planus is idiopathic. Mr Parker submitted that the expert evidence did not proffer a link between the surgery and the onset of the condition, and that Dr Curtain excluded surgery as a possible cause. Although Dr Lai mentioned malnourishment as a possible cause, Dr Abdullah did not mention it.

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<sup>9</sup> ARD page 2

<sup>10</sup> ARD page 2

<sup>11</sup> ARD page 5

22. Mr Parker submitted that the real issue was the onus of proof. He submitted that Dr Lai had not explained his qualifications for coming to the opinion he expressed. He submitted that, applying the well-known principles of *Makita v Sprowles*<sup>12</sup>, the applicant had not established on the balance of probabilities the necessary causal link.
23. Mr Parker also submitted that the suggested cause of stress had no evidential support. Again he submitted that Dr Lai's reference to stress was of no probative value because it was outside his speciality.
24. Mr Parker submitted that the opinions of Dr Lim, the general practitioner, were also of little probative weight. He said no expertise was proffered as to the basis of Dr Lim's conclusions, and after all he referred Ms Galea to Dr Abdullah, which would indicate a lack of confidence in his own ability to properly diagnose the origin of Ms Galea's Lichen Planus. Mr Parker submitted that one of the entries suggested from Dr Lim's notes before a diagnosis was obtained was that Ms Galea had "potential rosecia". Mr Parker submitted that I would not accept a possible explanation as being a reaction to the anti-inflammatories she had been prescribed, because only Dr Lim had made that suggestion.
25. There was no support for the assumptions made by Ms Galea's medical practitioners to substantiate a causal link of malnourishment or stress, or the ingestion of medication.
26. Mr Parker submitted that in all circumstances even if it was established that the medical science did allow for the possibility of the Lichen Planus having resulted from the surgery, I would nonetheless not be satisfied that she had satisfied her onus that it was probable that her condition was a consequence of the subject admitted injury.

### Mr Perry

27. Mr Perry agreed with Mr Parker's summation of the issue. He conceded that if the expert medical evidence established that it was impossible for Ms Galea's Lichen Planus to have been caused by the surgery following the injury then, regardless of the merits of the other facts relied upon, the action must fail.
28. Mr Perry took me to a passage cited in *Seltsam Pty Limited v McGuinness; James Hardie & Coy Pty Limited v McGuinness*<sup>13</sup> from *EMI (Australia) Ltd v Bes* per Heron CJ. Mr Perry submitted that a consideration of the medical evidence would result in the conclusion that such a link was possible.
29. Mr Perry made submissions as to the records of merits of the medical opinion in the case.
30. Mr Perry agreed with Mr Parker that the medical evidence issue would not be determinative. Mr Perry agreed that he still bore the onus of showing that the injury had caused a material contribution to the onset of the Lichen Planus. Mr Perry referred to *Kooragang Cement Pty Ltd v Bates*<sup>14</sup> in submitting that the evidence would strongly support a finding that the surgery was a material contribution to the onset of the Lichen Planus.
31. Prior to the surgery, Mr Perry said, the evidence was that Ms Galea exhibited no issues with her skin. She was now 46 years old without having suffered from any skin condition. Mr Perry pointed to the temporal connection between the onset of the condition one week after the surgery. Mr Perry conceded that the fact of there being no symptoms or evidence of vulnerability prior to the event was not conclusive, however in the context of Ms Galea's case, it had probative value as a link in the causal chain.

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<sup>12</sup> (2001) 52 NSWLR 705 (*Makita*)

<sup>13</sup> [2000] NSWCA 29 (*Seltsam*)

<sup>14</sup> (1994) 35 NSWLR 452 (*Kooragang*)

32. Mr Perry noted that no evidence had been lodged from Dr Hamsi but an inference could be drawn that his treatment besides referring Ms Galea to Dr Dowd, was by way of medication.
33. Mr Perry submitted that there was evidence upon which an inference that could be drawn that Ms Galea was under stress and malnourished. He referred me to the statement that Ms Galea could not cook for herself or her dependant autistic child, who became malnourished.
34. Mr Perry relied on the respondent's Dr Curtain. He accepted his comment that Lichen Planus was insufficiently understood. Mr Perry also relied on Dr Abdullah's opinion that the condition was idiopathic, and was an autoimmune condition.
35. Mr Perry pointed to the pain of which Ms Galea complained. Mr Perry submitted that taking all of those matters into account, including the reservations expressed in the medical evidence, a material contribution from the surgery (and therefore the subject injury for which such treatment was given) to the eruption of Lichen Planus was established. Mr Perry referred to *Mateus v Zodune Pty Ltd*<sup>15</sup>. Although Dr Abdullah acknowledged that there was "probably" no causal link, and certainly her condition had not been caused by her current employment, he did not disagree with the opinion of Dr Lai. Mr Perry conceded that Dr Abdullah probably did not have access to Dr Lai's report, but that his submission was nonetheless valid.
36. Mr Perry referred to the letter of claim<sup>16</sup> which was based on Dr Lai's report. That report indicated that the respondent was dealing with an allegation that malnourishment had been the cause of the Lichen Planus.
37. Mr Perry submitted that the reply in the s 74 Notice was that the condition was "probably unrelated to surgery". That, Mr Perry submitted, was not an answer to the claim as served.
38. Mr Perry referred to the explanation by Dr Curtain regarding the accepted wisdom as to the possible causes, which Mr Perry submitted was probably taken from the literature, and was speculative.
39. The key, Mr Perry submitted, was to see if the reports of Dr Lai and Dr Lim, together with the facts upon which he relied made it more probable than not that the stress, the malnourishment and particularly the pain following the surgery had caused the eruption of Ms Galea's skin condition. It was probable that Ms Galea had been ingesting anti-inflammatory medication, and that was significant, Mr Perry submitted, as Dr Curtain accepted that the consumption of nonsteroidal anti-inflammatories could be implicated as a cause of the condition in the literature to which he referred.

#### **Mr Parker**

40. Mr Parker in reply submitted that regardless of the tests in *Kooragang* and *Murphy v Allity Management Pty Limited*<sup>17</sup> the real question was whether the consequential condition resulted from the injury. I was referred to *Twins Pty Ltd v Luo*<sup>18</sup> as authority for the proposition that the common sense test in *Kooragang* had to be considered in the context of its statutory setting.

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<sup>15</sup> [2007] NSWCCPD 7 (*Mateus*)

<sup>16</sup> ARD page 8

<sup>17</sup> [2015] NSWCCPD 49 (*Murphy*)

<sup>18</sup> [2019] NSWCCPD 52 (*Luo*)

41. He submitted that the applicant could not satisfy her onus because it was not possible to say which of the competing causes advanced by Ms Galea - the surgery, the medication, her alleged malnourishment, or the autoimmune idiopathic nature of the condition - actually made the necessary material contribution to the onset of the Lichen Planus.
42. Mr Parker also submitted that Dr Lai was a plastic surgeon, and his expertise did not encompass psychiatry or dietary knowledge. His failure to demonstrate any qualification or training made his opinion of little probative use.

## Discussion

43. The issue at stake is whether Ms Galea has satisfied her onus. It is now accepted law that, in order to establish liability for a consequential condition, an applicant must show that the subject injury has materially contributed to the condition, taking into account the statutory context in which the principle is to be applied.<sup>19</sup> The statutory context in the present case is s 4 of the 1987 Act, and whether the onset of the lichen planus was a consequential condition caused by the admitted s 4 injury.

## Evidentiary facts

44. The evidence relied on by Ms Galea is compelling. It establishes:
  - (a) Ms Galea had not suffered any skin condition prior to the surgery.
  - (b) The condition came on within a week of the surgery.
  - (c) During the period between the subject injury on 27 June 2017 and the surgery on 26 July 2017, Ms Galea was stressed by the restrictions her injury caused on her ability to feed both her autistic son and herself. She felt that her son was malnourished during that time.
  - (d) Whilst no evidence was lodged as to the treatment Ms Galea was then undergoing, an inference is available that she was being treated by anti-inflammatory medication. I infer that Dr Lim's reference to Ms Galea's medication regime was based on his knowledge of her treatment under Dr Hamsi, which he would have had available when her management was transferred from Dr Hamsi to him on 21 July 2017.
  - (e) Dr Lim was the treating GP in the period immediately before and after the surgery, and his evidence is not without relevance. He suggested that "the anesthetic or post-operative pain medication" could trigger lichen planus, and I infer that the pre and post-operative pain medication was administered under his auspices. A further inference is available that Ms Galea was experiencing pain which caused the restrictions she described.

## The medical question

45. None of these evidentiary facts however would assist Ms Galea if it had been established that it was medically impossible for there to be a causal nexus between the surgery and the onset of her lichen planus condition. The passage referred to by counsel was at [92] of *Seltsam*:

"94 In circumstances where the aetiology of a disease is uncertain, or subject to significant scientific dispute, the Courts are not thereby disenabled from making decisions as to causation on the balance of probabilities. As Herron CJ said in *EMI (Australia) Ltd v Bes* [1970] 2 NSW 238 at 242:

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<sup>19</sup> See discussion in *Luo and Ozcan v Macarthur Disability Services Limited* [2020] NSWCCPD 21



'Medical science may say in individual cases that there is no possible connection between the events and the death, in which case, of course, if the facts stand outside an area in which common experience can be a touchstone, then the judge cannot act as if there were a connection. But if medical science is prepared to say that it is a possible view, then, in my opinion, the judge after examining the lay evidence may decide that it is probable. It is only when medical science denies that there is any such connection that the judge is not entitled in such a case to act on his own intuitive reasoning. It may be, and probably is, the case that medical science will find a possibility not good enough on which to base a scientific deduction, but courts are always concerned to reach a decision on probability and it is no answer, it seems to me that no medical witness states with certainty the very issue which the judge himself has to try.'

46. The evidence relied upon by the respondent does not deny that such a connection is impossible. Dr Abdullah thought that any causal link was not probable, as the condition of Lichen Planus was idiopathic and involved autoimmune considerations. Dr Abdullah's comment that "[the condition] was probably unrelated to the surgery" did not express an opinion denying that such a connection was possible.
47. Dr Curtain gave a more considered opinion. He confirmed that the causes leading to the appearance of Lichen Planus were "incompletely understood." He said that there were some features of an autoimmune disease, and that there were several known precipitating factors. Whilst including hepatitis C infection, exposure to the flu vaccine and heart/ blood pressure medication, he also mentioned "certain nonsteroidal anti-inflammatory drugs."
48. Dr Curtain also said agreed with Dr Abdullah that the Lichen Planus was "probably" unrelated to the surgery.
49. Dr Lai found there to be such a causal connection by virtue of the stress Ms Galea was under whilst awaiting surgery. That she was suffering from stress was supported by Ms Galea herself, whose account I have no reason to disbelieve.
50. I have already referred to the opinion of Dr Lim. He thought the Lichen Planus condition was "likely" related to the medication, which undeniably included the anaesthetic, but in addition the pain medications such as post-operative non-steroidal anti-inflammatory drugs. As I have indicated above, although no evidence was before me as to whether or not Ms Galea had actually taken such drugs I infer that Dr Lim's opinion was based upon his knowledge of the medication he had been prescribing.
51. It follows that I am satisfied that the applicant has satisfied her onus. Mr Parker appeared to suggest that there were so many possible causes thrown up, that I would not be able to determine which had been actually been responsible for the onset. On the contrary, there are so many causes that they may all be partly responsible. I am not required to point to any one in particular. The question as to whether the surgery was a material contribution to the onset of Ms Galea's Lichen Planus has accordingly been answered in the affirmative.

## **Summary**

52. I therefore find that the surgery was a material contribution to Mrs Galea's consequential condition of Lichen Planus.
53. Ms Galea has thereby suffered consequent post-inflammatory hyperpigmentation on her back, buttocks, legs and arms.

54. Accordingly, I remit this matter to the Registrar for referral to an Approved Medical Specialist for a whole person assessment on the following bases:
- (a) Date of injury: 27 June 2017
  - (b) Matters for assessment: Left upper extremity, Scarring
  - (c) Evidence:
    - (i) ARD and attached documents,
    - (ii) Reply and attached documents.